Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

JACK S. SPEARS
Petitioner,

v.

STATE OF LOUISIANA,
Respondent.

ON PETITION FOR A
WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF LOUISIANA

PETITION FOR WRIT OF CERTIORARI

BOBBY L. CULPEPPER*
TERESA C. CARROLL
J. CLAY CARROLL
525 East Court Avenue
Jonesboro, LA 71251
318/259-4184

* Counsel of Record

Attorneys for Petitioner

(a) QUESTIONS PRESENTED

1. Is the missapplication of construction fund statute of the State of Louisiana (La. R.S. 14:202) which provides for civil penalties instead of criminal penalties constitutional?

2. May a person be prosecuted under a bill of information that charges no crime?

3. May a bill of information be amended on the date of the trial and then a continuance (called a recess by the Second Circuit Court of Appeal of the State of Louisiana) be granted with the matter being refixed for trial under an entirely different jury venire three months later?

4. May a District Judge determine the amount of a civil penalty after a finding of guilty by the jury, based upon a pre-sentence investigation?

5. May the Louisiana Supreme Court wait two and one-half times its own regulations and rules before denying the writ, without same being a violation of the due process rights and right to a speedy trial of petitioner herein?

6. May the Louisiana Supreme Court refuse to recuse itself in connection with the consideration of whether or not the Louisiana Supreme Court timely decided an Application for Writs?

(b) LIST OF PARTIES

The parties herein are:

State of Louisiana

Jack S. Spears

CORPORATE DISCLOSURE STATEMENT

There is no corporate disclosure statement.

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Blakely vs. Washington
124 St. Ct. 2531; 159 L.Ed. 2d 403;
U.S. Lexis 4573 (2004) 15,16,17

Louisiana Statutes:

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Other Authorities:

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(d) CITATION OF REPORTS OF OPINIONS

State of Louisiana vs. Jack S. Spears
(La. App. 2d Cir. 3/17/05), 896 So. 2d 1280

State of Louisiana vs. Jack S. Spears, 2005-0964
(La. 4/4/06), 929 So. 2d 1219

(e) BASIS FOR JURISDICTION

(i) The decision of the Louisiana Second Circuit Court of Appeal, after remand by the Louisiana Supreme Court was on September 27, 2006. An Application for Rehearing was denied on October 26, 2006. The Louisiana Supreme Court denied an Application for Writ of Certiorari on August 31, 2007. Thereafter an Application for Rehearing was filed and an Application to Recuse the Louisiana Supreme Court in connection with said Application for Rehearing was filed. The Louisiana Supreme Court, without even commenting on the Motion to Recuse, denied the Application for a Reconsideration on November 21, 2007.

(ii) Same as i.

(iii) Not applicable.

(iv) This Honorable Court has jurisdiction under Supreme Court Rule 10 in that the Louisiana Supreme Court, a State Court of last resort, has decided an important Federal question in a way that conflicts with other state court cases and with Federal decisions, including a decision by this Honorable Court.

The Louisiana Supreme Court, a State Court of last resort, has decided an important question of Federal law that has not been, but should be, settled by this Honorable Court and has decided, by denying a Writ of Certiorari, an important Federal question in a

way that conflicts with relevant decisions of this Honorable Court.

(v) Rule 29.4(b) or (c) is not applicable.

(f) CONSTITUTIONAL PROVISIONS AND STATUTES

La. R.S. 14:202:

Contractors; misapplication of payments prohibited; penalty.

A. No person, contractor, subcontractor, or agent of a contractor or subcontractor, who has received money on account of a contract for the construction, erection, or repair of a building, structure, or other improvement, including contracts and mortgages for interim financing, shall knowingly fail to apply the money received as necessary to settle claims for material and labor due for the construction or under the contract.

B. When the amount misapplied is one thousand dollars or less, whoever violates the provisions of this Section shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned for not less than ninety days nor more than six months, or both.

C. When the amount misapplied is greater than one thousand dollars, whoever violates this Section shall be fined not less than one hundred dollars nor more then five hundred dollars, or imprisoned with or without hard labor fer not less than ninety days nor more than six months, or both, for each one thousand dollars in misapplied finds, provided that the aggreggate imprisonment shall not exceed five years.

D. Any person, contractor, subcontractor, or agent of a contractor or subcontractor who knowingly fails to apply construction contract payments as required in Subsection A shall pay to the court, and the court shall transfer to the person whose construction contract payments were misapplied, an amount equal to the sum of the payments not properly applied and any additional legal costs resulting from the misapplication of construction and fund payments, including a fee charged by the clerk of court for handling such payments. (Amended by Acts 1960, No. 554, § 1, Acts 1984, No. 372, , § 1; Acts 1986, No. 1040, , § 1; Acts 1986, No. 625, , § 1; Acts 1990, No. 690, , § 1.)

Constitution of the United States, Amendment VI:

Restriction of Judicial Power

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Louisiana Constitution of 1974 Article I, § 16:

Right to a fair trial

Every person charged with a crime is presumed innocent until proven guilty and is entitled to a speedy, public, and impartial trial in the parish

where the offense or an element of the offense occurred, unless venue is changed in accordance with law. No person shall be compelled to give evidence against himself. An accused is entitled to confront and cross-examine the witnesses against him, to compel the attendance of witnesses, to present a defense, and to testify in his own behalf. However, nothing in this Section or any other section of this constitution shall prohibit the legislature from enacting a law to require a trial court to instruct a jury in a criminal trial that the governor is empowered to grant a reprieve, pardon, or commutation of sentence following conviction of a crime, that the governor in exercising such authority may commute or modify a sentence of life imprisonment without benefit of parole to a lesser sentence which includes the possibility of parole, may commute a sentence of death to a lesser sentence of life imprisonment without benefit of parole, or may allow the release of an offender either by reducing a life imprisonment or death sentence to the time already served by the offender or by granting the offender a pardon. (Acts 1995, No. 1332, § 1, approved No. 18, 1995, eff. Dec. 23, 1995.)

(g) STATEMENT OF THE CASE

Ricky and Karen Kirkham entered into a contract with Spears Construction Company, Inc., regarding the construction of two chicken houses to be completed pursuant to ConAgra's specifications. The Kirkhams deposited money via wire transfer into a checking account maintained by Spears Construction Company, Inc. Under the terms of the contract, Spears Construction Company, Inc. was to pay for all necessary labor and materials with those funds. However, at the time of his arrest in May of 2000, the parties had encountered problems with regard to the completion of the contract and some liens were filed by sub-contractors and material suppliers with regard to the construction project. There was no evidence whatsoever at the trial that the liens were actually owed.

The defendant was initially charged by bill of information with one count of misapplication of payments as set forth in La. R.S. 14:202 with said misapplication being greater than $1,000.00. The defendant entered a plea of not guilty to the charge.

On July 29th, 2003, the parties appeared for trial. Prior to the trial commencing, the State moved to amend the bill of information to reflect the amount of misappropriation to be in excess of $10,000.00 to which the defendant objected. Said amendment was allowed and then followed by the State moving for a continuance due to the absence of an out of state witness which was granted over defense objection. (It was later determined by the Louisiana Second

Circuit Court of Appeal that a continuance should not have been granted and that what the District Court did without knowing what it did was to grant a recess. Of course, no recess was asked for.)

The trial this matter was refixed for October 27, 2003, three months later before an entirely different jury panel and was held on that date through October 30, 2003. The jury returned a verdict of "guilty as charged". The defendant was sentenced to serve four years at hard labor in addition to paying a fine of $500.00 and all costs of the proceedings. (The Second Circuit Court of Appeal in its original decision was apparently of the opinion that the sentence had been suspended.) The defendant was also ordered to pay $103,804.22. This was ordered under a portion of the statute in question which provides that anyone "who knowingly fails to apply construction contract payments is required . . . to pay to the court, and the court shall transfer to the person whose construction contract payments were misapplied, in an amount equal to the sum of the payment not property applied. . ." The District Court improperly classified this payment as "restitution."

The Louisiana Second Court of Appeal rendered a decision on March 17, 2005 reversing the decision of the District Court and entered a judgment of acquittal.

The Louisiana Supreme Court granted writs and reversed the ruling of the Court of Appeal and remanded on April 4, 2006. The Court of Appeal then affirmed on September 27, 2006 and denied

defendant's Application for a Rehearing on October 26, 2006.

An Application for Writ of Review was filed with the Louisiana Supreme Court which was denied on August 31, 2007. Defendant (petitioner herein) filed an Application for Rehearing arguing constitutional issues and the fact that the Louisiana Supreme Court, in violation of its own regulations, had waited two and a half times the time set forth in its own regulations for acting upon writs before acting in this matter. Also, a Motion to Recuse the Louisiana Supreme Court, was filed in accordance with the rules of the Louisiana Supreme Court. This Application for Reconsideration was denied on November 21, 2007, without the Louisiana Supreme Court acting on the Motion to Recuse.

(i) This is a review of a state court judgment. All proceedings in state court have been completed as of this point. The federal issue of the right of a defendant in a criminal proceeding to have a jury determine the amount of the payment (civil in nature) to be paid to an alleged victim in connection with misapplication of construction funds was raised before the Louisiana Second Circuit Court of Appeal, after remand by the Louisiana Supreme Court. The constitutional issue as to the right to a speedy trial or a speedy determination in a criminal case was raised in the application of Mr. Spears for a rehearing before the Louisiana Supreme Court after the Application for Writ of Review following the decision of the Court of Appeal on remand was denied by the Louisiana Supreme Court.

A reply brief filed in the Second Circuit Court of Appeal raising the constitutional issue as to who should decide the amount of misappropriation for the purpose of a civil type judgment was raised in the reply brief of petitioner herein and is quoted as follows:

> "In this case, the only determination by the jury was a verdict of "guilty as charged" referring back to the amended bill of information alleging misappropriation in excess of $10,000.00. Of major importance to the defendant is the fact that the jury did not determine the amount of misappropriation which was ultimately determined by the Judge in ordering restitution as a condition of his parole. On this point, in addition to the jurisprudence cited in our original brief, we would also cite this Honorable Court to the Sixth Amendment of the United States Constitution which guarantees the right of the accused in all criminal prosecutions to enjoy a speedy and public trial by an impartial jury. Recently, in the case of Blakely vs. Washington, 124 S. Ct. 2531; 159 L. Ed. 2d 403; 2004 U.S. Lexis 4573 (2004), the United States Supreme Court found that the defendant's federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence were violated the case was reversed and remanded. In that case, the Trial Court imposed and exceptional sentence of 90 months as opposed to the maximum sentence of 53 months standing on the facts admitted in the defendant's guilty plea after

making a judicial determination that the defendant had acted with "deliberate cruelty". The Court considered whether this violated the defendant's sixth amendment right to trial by jury and determined that it did. The Blakely court referred back to their case in Apprendi vs. New Jersey, 530 U.S. 466; 147 L. Ed. 2d 435; 120 S. Ct. 2348 (2000) with regard to the holding that every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment in his case. That clearly was not done in the case before the Court and, under the rationale of Blakely, a reversal is mandated as the record clearly shows that the Judge and not the jury, determined the amount of misappropriation to be $103,804.22.

Additionally, the State has cited the case of State vs. Cohn, 783 So. 2d 1269, 2000-0313 (La. 4/3/01) for the proposition that the Judge could determine the amount of misappropriation and not the jury. However, the only determination that can be made from the summary of the Trial Court proceedings by the Supreme Court of Louisiana is exactly what is stated by the State in brief and nothing else. That conclusion being that the jury specifically determined that the amount misapplied on both counts exceeded $10,000.00 and that the Trial Court sentenced him to imprisonment and suspended that based on probation with a condition of restitution. There is no specific language that the jury and not the Judge determined the amount of misappropriation so the case cannot be extended to justify the position of the State that the Judge

as opposed to the jury could determine the exact amount of misappropriation. Additionally, we would note that the Cohn case was decided prior to the United States Supreme Court decision of Blakely vs. Washington previously addressed herein."

Reference the Louisiana Supreme Court taking two and one-half times the self-imposed time limit for acting on writs, this is raised in the Application for Rehearing for the Louisiana Supreme Court. Quoting from same:

"The right to a speedy trial or judicial determination at every level is guaranteed by both the Federal and State Constitutions. See U.S. Const. Amendment 6, La. Const. Art. I, Section 16.

That the defendant herein had a fundamental constitutional right to a speeding determination of his Application for Writs. If the District Court had held this matter under advisement for 9&1/2 months, the District Court would have already been disciplined by this Honorable Court, if reported.

In support of our position herein see Barker vs. Wingo Warden, 407 U.S. 514; 92 S. Ct. 2182; 33 L. Ed. 2nd 101; 1972 U.S. LEXIS 34.

This Honorable Court has reasonable times built into its Rules which simply have been ignored herein.

We have not found any case directly on point on this issue but it raises a grave constitutional issue, when this Honorable Court does not follow its own Rules.

Although the U. S. Supreme Court affirmed the conviction in the Barker case there was some discussion about whether or not the petitioner in Barker had waived any claims. There is no way in this case that defendant herein waived anything because he simply had no control over it and we can find no mechanism in the Rules of this Honorable Court whereby this Court could have been mandamused to render a decision.

We would note that the ultimate decision in Barker has been criticized and distinguished, but not the constitutional issues.

As stated in Barker, the primary burden, in a case of this nature would be on this Honorable Court. Contrary to the Barker decision, in this case, as we have pointed out, the defendant had nothing to do with the delay.

As pointed out in the Barker, by Justice White and Justice Brennan, a delay may seriously interfere with the defendant's liberty or in this case, with "other rights." One of the factors to be considered in this matter would be the defendant's "anxiety and concern."

It would appear that an evidentiary hearing in this matter would be required. However, there is simply no procedure before this Honorable Court to have an evidentiary hearing.

In many cases, the delay can be blamed upon the defendant. However, in this case, the blame falls solely on this Court.

We would further note that this Honorable Court indicates that State vs. Reaves, 376 So. 136 (La. 1979) held that the delay of 3&1/2 months was sufficient to violate the defendant's rights."

(ii) This is not a review of a judgment by a United States Court of Appeal.

(h) DIRECT AND CONCISE ARGUMENT

Petitioner herein was charged with a bill of information under a statute which is unconstitutional because it provides civil remedies instead of criminal remedies. An amendment to the bill of information was allowed over objection of defense counsel, on the date that the trial was to begin. Thereafter, the State moved for a continuance which was contested. The District Court granted what she called a continuance and what the Court of Appeal called a recess. The recess ended three months later when the defendant was tried before a completely different panel. It is our contention that this also constitutes a violation of due process.

After the defendant was found guilty, the District Court, on her own, and apparently in accordance with a pre-sentence investigation had a figure suggested by the District Attorney's Office but never proven, that the defendant should pay $103,804.22 in the nature of a civil judgment although the court called it "a condition of parole." Under this Honorable Court's decision in Blakely vs. Washington, 542 U.S. 296, 124 S. Ct. 2551, 159 L.Ed. 2d 4003, that decision should have been made by the jury, not the Judge.

Then the Louisiana Supreme Court waited ten months or two and a half times the time restraints that the Court placed on its own self before acting on an Application for Writs. We contend that this was a violation of the Sixth Amendment, as was the

decision of the Judge instead of the jury about the amount of money that should be paid in the nature of a civil judgment by defendant (petitioner herein).

Then, the Louisiana Supreme Court did not even act upon a Motion to Recuse the Court to allow impartial judges to determine the issue as to whether or not defendant's right to a speedy trial and/or speedy determination had been violated.

The action of the Louisiana Supreme Court, in this matter was also contrary to its decision in the case of State vs. Weems, 593 So. 2d 358 (La. App. 2 Cir. 1992) in which writs were denied by the Louisiana Supreme Court. That matter was also handled by the writer.

Under La. R.S. 14:202 the misappropriation is either under $1,000 or over $1,000. There is no such crime as misappropriation of over $10,000.

CONCLUSION

For all the aforegoing reasons, petitioner (Jack S. Spears) respectfully requests that this Honorable Supreme Court of the United States grant review of this matter.

Respectfully submitted,

BOBBY L. CULPEPPER*
TERESA C. CARROLL
J. CLAY CARROLL
525 East Court Avenue
Jonesboro, LA 71251
318/259-4184

* Counsel of Record Attorneys for Petitioner

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MOTION FOR STAY OF EXECUTION
OF SENTENCE

Now into court, through undersigned counsel, comes Jack S. Spears, who, with respect shows and avers as follows:

1.

That Jack S. Spears has applied to this Honorable Court for a Writ of Certiorari to reverse the decision of the Louisiana Supreme Court.

2.

That Jack S. Spears has been notified through undersigned counsel to appear in court on January 3, 2008 for execution of sentence.

3.

That in view of the Application for Certiorari herein, the execution of sentence should be stayed by this Honorable Court.

WHEREFORE, Jack S. Spears prays that this Honorable Court stay the execution of the sentence in this matter.

FURTHER PRAYS for all necessary orders and decrees and for just and equitable relief.

BOBBY L. CULPEPPER*
TERESA C. CARROLL
J. CLAY CARROLL
525 East Court Avenue
Jonesboro, LA 71251
318/259-4184
Fed. Bar #925

* Counsel of Record Attorneys for Petitioner